IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Honorable William J. Lindberg, *Judge*

Appellee's Brief

EDWARDS E. MERGES
Attorney for Appellee

Office and Post Office Address:
1511 Smith Tower
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JURISDICTION

The appellant's brief does not contain a jurisdictional statement in accordance with Rule 20(b) in that no statement of the pleadings necessary to show jurisdiction of the United States Court of Appeals appears

under the heading "Jurisdiction," and no page reference to pages of the record is made. Accordingly, appellee hereby moves to dismiss the appeal, or in the alternative, to strike the appellant's brief.

COUNTER STATEMENT OF THE CASE

Without waiving his motion to dismiss, the appellee submits herewith the following counter statement of the case:

On February 19, 1952, the appellee, through his father and next friend, filed a complaint under Section 503 of the Nationality Act of 1940, Sec. 903, Title 8 U.S.C. The complaint sought a judgment declaring the appellee to be a citizen of the United States by reason of his being the foreign-born son of a United States citizen under Section 1993 R.S. as amended. (R. 3-7.) The appellant filed no answer but during the hearing it was stipulated that he might be deemed to have interposed a general denial. (R. 23.)

A hearing was had before the United States District Court for the Western District of Washington, Northern Division on October 22, 1952. The District Court made Findings of Fact, Conclusions of Law and a Decree and Adjudication of Citizenship. (R. 22-27.) The substance of the Findings and Conclusions are as follows: That the appellee was not in court because of the appellant's failure to issue him a travel document to

permit him to travel from Hong Kong, China, to attend the hearing in the United States upon the issue of his citizenship. That the appellee's father was and is a United States citizen and filed an identification affidavit with the appellant's representative, viz., the American Consul at Hong Kong. The identification affidavit and request for travel documents were filed in *February of 1951, or approximately one year before the commencement of the above action.* The American Consul in Hong Kong has never issued a passport or travel document to enable the appellee to come to the United States and for this reason the appellee could not appear personally in court. The Decree and Adjudication of Citizenship held that the appellee is a United States citizen by reason of being the foreign-born son of a United States citizen. (R. 26.) The Decree and Findings were based upon the testimony given in court by the appellee's father (R. 41-55), the appellee's paternal grandmother (R. 56-66), the appellee's paternal uncle (R. 67-74), the appellee's cousin (R. 74-80), a family friend who had known the appellee in China (R. 80-82), and the wife of appellee's uncle, his aunt by marriage (R. 83).

At the conclusion of appellee's case, *the appellant offered no controverting evidence.* The following occurred: (R. 86-89.)

MR. MERGES: That is our case, if your Honor please.

THE COURT: *You have no proof.*

MR. BELCHER: *No, your Honor.*
I think the evidence is wholly insufficient to grant the relief prayed for.

It is based entirely upon hearsay. No direct evidence at all of the birth of this child and, further than that, it seems strange that no effort was made to bring this alleged child to the United States until he reached the age of twenty-seven years, although there was plenty of opportunity to do so.

THE COURT: I might ask you this, Mr. Belcher: What testimony do you think there would be to establish birth?

MR. BELCHER: I think, if your Honor please, that this is one case in which the blood grouping test would be proof positive, and before this case is determined by your Honor, if in the event of our denial of the motion to dismiss because of the lack of sufficient evidence, that the Court in this case should order a blood grouping test, particularly in view of the fact that one of the witnesses testified here it is the Chinese custom to adopt and take in children.

THE COURT: It is the custom in this country to do that, too.

MR. BELCHER: I realize that. I say, there is no direct evidence here at all that this man is the father of this child. It is all hearsay, every bit of it.

THE COURT: Isn't that true of most people except where you have birth certificates?

MR. BELCHER: Pardon?

THE COURT: Isn't that true in most cases except where you have birth certificates?

MR. BELCHER: No. I think, as your Honor knows, in some of these Chinese cases they have introduced birth certificates.

THE COURT: What if they haven't any?

MR. BELCHER: The burden is upon them; not us.

THE COURT: The Court thinks it is proved and grants the Petition.

MR. BELCHER: I didn't hear.

THE COURT: The Court thinks the proof is sufficient.

MR. BELCHER: And the Court refuses to order——

THE COURT: (Interposing) I see no occasion to order it unless you have some other showing than guess work. I don't think it is sufficient to say lack of a birth certificate is proof of your position. There is nothing else you have offered at all.

MR. BELCHER: Well, there is no showing here, if your Honor please, and there has been no positive proof here, of citizenship, and the burden is entirely upon the Petitioner.

THE COURT: I grant that, but the statute provides for this action. What kind of proof is the Court supposed to have? The Court realizes that there can be situations where a person is an imposter and not a true son, but at the same time is the Court to listen to witnesses and assume that they are not telling the truth?

Maybe the Court is under some misapprehension and maybe the statute should be changed, but when an action like this is filed and these people get on the stand and they are citizens and they take the oath and the presumption is that they understand then they testify, granted it is hearsay, but there are many, many people, most of the people in the world, whose birth must be proved by hearsay, and that type of hearsay testimony is acceptable.

MR. BELCHER: The father and mother are the only two people that could testify to that.

THE COURT: *The father can't testify if he isn't there and the mother is dead.*

The fact that the mother died—the Court doesn't wish to get into a debate, but it appears to the Court that if the mother is dead—*and there is no other person who can testify of personal knowledge, whether it be a doctor or midwife, whoever it may be, you say that that isn't sufficient showing;* or, on the part of the Government in a case of this character, merely to show that there is no one else who can say that they know that the son——

MR. BELCHER: Well, I would like to have the record show that I ask the Court, under Rule 35, for a blood test, a blood grouping test, which would be proof positive of the lack of parentage, and that is our defense here—that there is no

identification. This would be a very good case to have the Court of Appeals determine.

THE COURT: *I think it may be. I think in regard to your last motion the record may so show. I think it is not timely and the Court will say that the testimony is not such as to warrant the Court on its own motion, to ask for that test.*

Frankly, I will say this: These cases are a problem to the Court. Recognizing that situations may present themselves where persons other than sons of citizens will contend to be such, unless the Government has something more to establish that, I don't think the Court is in a position to presume that these witnesses are not telling the truth.

ARGUMENT IN SUPPORT OF JUDGMENT

The appellee brought suit under Section 503 of the Nationality Act of 1940 as he had a legal right to do. Such suits are not without precedent and when proper and sufficient evidence is introduced in support of the allegations of the petition, the District Court is empowered by the very terms of the statute itself to make a Decree and Adjudication of Citizenship. The statute states:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any department or agency or executive official thereof upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against

> the head of such department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the District in which such person claims a permanent residence, *for a judgment declaring him to be a national of the United States*——" (Italics ours).

In the following cases, among others, Federal Courts have considered similar actions brought under Section 503 of the Nationality Act of 1940. *Acheson v. Yee King Gee,* 184 F.2d 382; *Kiyoshi Kawaguchi v. Acheson,* 184 F.2d 310; *Wong Wing Foo v. McGrath,* 196 F.2d 120; *Acheson v. Nobuo Ishimaru,* 185 F.2d 547; *Podea v. Acheson,* 2 Cir., 179, F.2d 306; *Attorney General v. Richetts,* 165 F.2d 193; *Bauer v. Clark,* 7 Cir., 161 F.2d 397; *Brassert v. Biddle,* 2 Cir. 148 F.2d 134; *Look Yung Lin v. Acheson,* 187 F. Supp. 463.

In the instant case all of the witnesses testified affirmatively that the appellee is the person whom he claims to be, the blood son of Lee Kut, an American citizen. It is, of course, conceded that if the appellee is the son of Lee Kut, he is an American citizen and is entitled to enter and remain in this country. Examination of the testimony of the witnesses reveals that all of them were in a position to know the relationship in question and all testified positively and affirmatively. In addition to the testimony, there was introduced appellee's Exhibit No. 1, a copy of the appellee's

father's Certificate of Identity (R. 40), Exhibit No. 2, a letter from the District Director of Immigration regarding the appellee's father's citizenship status (R. 41), Exhibit No. 3, a picture of the appellee which was identified as being the appellee, son of Lee Kut (R. 43), Exhibit No. 4, *a group picture taken several years ago* of the appellee's cousin and the appellee. The picture was taken in 1940 and the cousin was one of the witnesses who testified at the time of the trial (R. 50, 74 and 75). Exhibit No. 5, the war service record of appellee's father (R. 51).

The appellant offered *no evidence* as we have already pointed out. The government's principal contention made at the time of the trial seemed to be that the appellee's petition should be dismissed by reason of the fact that the testimony given by the various witnesses was "hearsay." Regarding such testimony, this Court in the case of *United States v. Wong Gong,* 70 F.2d 107, said:

> "The testimony of the witness as to the date and place of his birth, is of course, hearsay, *but it is competent.* Wigmore on Evidence, Sec. 1501; *United States v. Tod* (C.C.A.) 296 F. 345. In the case at bar appellee testified before the District Court in the trial *de novo* and the testimony given by appellee before the Commissioner and before the Immigration Inspector as to where he had

> lived since his birth, was also introduced. The District Judge accepted this testimony, which, if believed, is sufficient to sustain the order. We cannot say that the testimony of appellee is insufficient and the order must be affirmed." (Italics ours.)

In the circumstances presented in the instant case, the Court made a Decree in accordance with specific powers given it by the statute. The Decree was adequately supported by the evidence and such evidence has been held to be competent evidence in the Wong Gong case, *supra.* Accordingly, the Decree entered herein should stand.

ANSWER TO APPELLANT'S ARGUMENT

Appellant's First Assignment of Error

The appellant first assigns as error (Br. p. 26) the District Court's refusal to dismiss plaintiff's complaint for lack of jurisdiction. Appellant's argument is, in substance, that "the American Consul at Hong Kong had not completed his investigation and appellee had therefore not been denied any right as an American citizen."

In the first place it will be noted that the District Court said (R 40) "Well the record may show that there was no motion to dismiss filed."

If the rule were, as contended by the appellant, it is obvious that an individual in the status of the appellee would be entirely at the mercy of the very person against whom he seeks relief since the appellant could defeat the appellee's right by simply refusing to act in one way or the other. In the instant case, the appellant refused for a period of a year to furnish the appellee with a travel document and has never indicated when, if ever, he intended either to give the appellee a travel document or refuse to do so. Certainly the failure of the appellant to act is, in the circumstances presented in this case, tantamount to a refusal. If not, how long should a person in the place of appellee be required to wait? The Court found in October of 1952 that although the appellee's father had filed an identification affidavit with the Consul in Hong Kong in February of 1951 (R. 24), the Consul had failed to grant the travel document. In other words, the Consul sat on the matter and refused to act for a period of approximately twenty months. We ask appellant how much time should he have to act?

With regard to the law on the subject, we respectfully invite the Court's attention again to Section 503 (Title 8, Sec. 903) which provides in part as follows:

> "If a person who claims a right or privilege as a national of the United States is denied such right or privilege by any department *or agency or executive officer thereof* * * *" (Italics ours.)

We see from the very terms of the statute itself that a denial by an agent or executive officer of a department head also gives a person, such as appellee, cause of action under the statute. The statute does not require an appeal or final action by the department head himself as can be seen by the very terms of the statute itself where it says, *"or agency or executive officer thereof."*

In addition to the terms of the statute, this Court in the Wong Wing Foo case, *supra,* said, among other things at page 122:

> "Nothing in the above text suggests that the 'action * * * for a judgment declaring him to be a national' *is to succeed some prior administrative proceeding. This section is largely invoked where there has been no administrative proceeding at all.* Such is the case where the Department of State refuses to give a passport, *Perkins v. Elg,* 307 U.S. 325, 59 S.Ct. 884, 83 L.Ed. 1320; *Podea v. Acheson,* 2 Cir., 179 F.2d 306; or where a consul refuses to register a person as a United States national, *Acheson v. Mariko Kuniyuki,* 9 Cir., 189 F.2d 741; or refuses to allow a person claiming American citizenship to come to this country, *Acheson v. Yee King Gee,* 9 Cir., 184 F.2d 382; or where American citizens acting under claimed duress have been filed with the Attorney General notices of their renunciation of citizenship and then later seek to have them set aside, *McGrath v. Tadayasu Abo,* 9 Cir. 186 F.2d 766. In none of the above cases is the Section 903 action a trial *de novo. There has not been anything*

> *tried by the Department of State or of Justice to be tried again as on appeal or review.*" (Italics ours.)

In the case of *Hichino Uyeno v. Acheson,* 96 F. Supp. 510, this District Court, speaking through Judge Yankwich, said:

> "It is a fundamental rule of equity jurisprudence that he who prevents the exercise of a right by another cannot insist that the right was lost during the period in which its exercise was prevented by him or by order of Court."

Certainly this "fundamental rule of equity" applies where the appellant refuses to act upon the application by simply doing nothing. Can he urge this failure to act, his own failure to act, as being a reason to deprive the appellee of rights given him under the statute? We think not. This principle was recognized also in the case of *Kiyoshi Kawaguchi v. Acheson,* 184 F.2d 310, when the Court said: "When such an application is made in good faith and the claim of citizenship has a substantial basis such a certificate must issue to enable the applicant to travel to the United States for the limited purpose of attending and testifying at the trial of his pending action."

This being the law it is difficult to see how the appellant can be heard to complain of the District Court's decision because the appellee's application (R. 7), alleged *"good faith"* and a "substantial basis" and

yet the appellant refused and still refuses to issue appellee a travel document or anything at all "to enable the applicant to travel to the United States" for the purpose of attending and testifying or for any purpose at all. Also on this point and on the point raised by appellant that appellee should not be heard because he is not even in the United States, see *Acheson v. Yee King Gee,* 184 F.2d 382, where this Court said:

> "The first point has to do really with venue rather than jurisdiction. The contention is that in the circumstances of the case the only court in which action might be brought was the District Court for the District of Columbia, where the Secretary resides. However, Section 503 of the Act provides that the action may be brought either there or in the district in which the *person asserting nationality 'claims a permanent residence.'* The complaint alleged that appellee claims his permanent residence as Seattle, Washington, where his father resides. *The allegation sufficed to invoke the jurisdiction of the court below; and the court found as a fact that the claim of Seattle residence was made in good faith and upon substantial basis.* It is to be noted that the statute permits the bringing of the suit regardless of *whether the plaintiff is within the United States or abroad.* In the circumstances in evidence the minor's claim to permanent residence where his father lived was neither irrational nor unfounded." (Italics ours.)

Sec. R. 4 where appellee has made similar claim of residence.

Appellant's Second and Third Assignments of Error

Appellant's Second and Third Assignments of Error involve the same point and will therefore be discussed together. The substance of appellant's point is that the District Court erred in directing the appellant to issue a travel order to permit appellee to travel to the United States for the purpose of attending the hearing upon the question of his citizenship.

In the first place, we do not perceive how the Court's ruling on this point has affected the ultimate ruling in the case at bar and how, therefore, it can logically be assigned as error. In the case at bar the District Court held that the appellee is a citizen of the United States. Whether the District Court directed the appellant to issue a travel document does not affect the ultimate ruling one way or the other. Furthermore, the appellant refused to issue the travel document so it is difficult to see how he was harmed in any way by the order complained of. *Issuance of such an order is not without precedent and has been held by the Court to be a non-appealable order and "a step toward final disposition of the merits of the case."* See *Acheson v. Nobuo Ishimaru,* 185 F.2d 547, where, in a *per curiam* opinion this Court said:

> "We are of opinion that the order below is not appealable. It appears not to fall 'in that small class which finally determine claims of rights separable from, and colateral to, rights asserted in

> the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528. *By this order the District Court but took a step toward final disposition of the merits of the case.* The order is more nearly analogous to that held purely interlocutory in *Cobbledick v. United States,* 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783, involving an attempted appeal from the denial of a motion to quash a subpoena *duces tecum.*" (Italics ours.)

See also *Kiyoshi Kawaguchi v. Acheson, supra.*

Appellant's Fourth Assignment of Error

In the appellant's Fourth Assignment of Error he urges two things. (1) That "there was absolutely no competent evidence of identity." In this regard we have already pointed out that such evidence as was given in this case has already been held to be competent. See *United States v. Wong Gong, supra.* (2) That the Court should have ordered a blood test, and cites as authority Rule 35, Federal Rules of Civil Procedure, together with *Beach v. Beach,* 114 F.2d 479 and *Siblach v. Wilson & Co.,* 312 U.S. 1.

There are numerous answers to appellant's contention, the first of which is that the appellant made no motion for a blood test until the trial was ended. The Court said, "I think it is not timely and the Court will say that the testimony is not such as to warrant

the Court, an its own motion, to ask for that test." (R. 89.) In addition to the fact that the motion was not timely, the test would prove nothing since even conceding that such tests are entirely reliable, they are valueless without the blood groupings of *both parents* as shown by the table set out by appellant himself on page 48 of his brief. The record in this case shows, and the Court found, that the appellee's mother is dead (R. 88), and that since she is therefore unavailable for a blood test, we would like to know what the appellant would seriously contend in regard to the value of a test of the father's blood alone, since according to appellant's own tables such a test would be valueless.

Thirdly, we think, although the question is not directly presented in this case by reason of the untimely motion and the death of the mother, that Rule 35 does not give the Court power to order a blood test in *such a case as this.* Rule 35, by its own terms, restricts the Court's power to "the mental or physical condition of *a party.*" The appellee's father is certainly not a real party to this controversy and the appellant has cited no authority giving the Court jurisdiction over him. The case of *Beach v. Beach, supra,* is a divorce case where an actual party to the controversy was involved and the case of *Siblach v. Wilson & Co., supra,*

involved facts entirely different from those presented in the case at bar.

Appellant's Fifth and Sixth Assignments of Error

The appellant seems to have directed no specific argument to Assignments of Error Five and Six, and in answer to the bare assignments, we respectfully invite the Court's attention to our "ARGUMENT IN SUPPORT OF JUDGMENT" previously made.

SUMMARY AND CONCLUSION

The judgment of the District Court and the Findings of Fact made in connection therewith are adequately supported by the evidence and the law. Appellant has failed to show that the Court committed any error in the course of the trial and accordingly the judgment entered herein should be affirmed.

Respectfully submitted,

EDWARDS E. MERGES
Attorney for Appellee